Supreme Court, U. S.
FILED
MAY 2 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1664

BEN and LINDA ALLUSTIARTE, *Petitioners*

v.

HENRY ELWOOD PETERS and KERN VALLEY PACKING CO.; and RUDNICK LAND AND CATTLE CO., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TIMOTHY WAYNE SALTER
CARDOZO, NICKERSON, MARTELLI,
SALTER, CURTIS & ARATA
Attorneys at Law
812 - 13th Street
Post Office Box 3030
Modesto, California 95353
Telephone: 209/521-1800

Attorneys for Plaintiffs-Appellants,
BEN and LINDA ALLUSTIARTE

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

BEN and LINDA ALLUSTIARTE, *Petitioners*

v.

HENRY ELWOOD PETERS and KERN VALLEY PACKING CO.; and RUDNICK LAND AND CATTLE CO., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on January 11, 1979.

OPINIONS BELOW

The Order Dismissing Proceedings of the Bankruptcy Judge, attached hereto as Appendix A, is unreported. The Memorandum and Order of the District Court for the Eastern District of California, attached hereto as Appendix B, is unreported. The Memorandum of the United States Court of Appeals for the Ninth Circuit, attached hereto as Appendix C, is unreported.

JURISDICTION

The judgment of the Court of Appeals, continued in Appendix C, was made and entered on January 11, 1979. The Petition of Petitioners herein for a rehearing was denied on April 2, 1979. An Order Staying Issuance of Mandate, pursuant to Petitioners' Motion, was made and entered on April 16, 1979. The jurisdiction of this Court is involved under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Was dismissal of Petitioners' Chapter XII Bankruptcy Petitions proper?
2. Should Petitioners have been afforded more time to obtain approval of a plan of arrangement?

STATUTES INVOLVED

11 U.S.C. § 881 provides as follows:

If the statement of the executory contracts and the schedules and statement of affairs, as provided by paragraph (1) of Section 424 of this Act, are not duly filed, or if an arrangement is withdrawn or abandoned prior to its acceptance and no other arrangement is pending, or if no arrangement is accepted at the meeting of creditors or within such further time as the Court may fix, or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the Court, or if confirmation of the arrangement is refused, the Court shall—

(1) where the petition was filed under Section 421 of this Act, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this Act; or

(2) where the Petition was filed under Section 422 of this Act, enter an order upon hearing after notice to the debtor, the creditors, and such other persons as the Court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under this chapter, whichever in the opinion of the Court may be in the interest of the creditors.

11 U.S.C. § 823, provides as follows:

A debtor may file a Petition under this chapter in a pending bankruptcy proceeding before his adjudication.

STATEMENT OF THE CASE

Petitioners' filed Petitions under Chapter XII of the Bankruptcy Act on June 24, 1974 in the Federal District Court, Eastern District of California. The matter was referred to Bankruptcy Judge, Frederick Reyland, and the First Meeting of Creditors was held on August 1, 1974. The matter was then continued to October 3, 1974, and a subsequent hearing was held on December 5, 1974. Continued First Meetings of Creditors were held on January 23, 1975, and February 13, 1975. On April 17, 1975, Debtors proposed a modified plan of arrangement. That meeting was continued until May 29, 1975, for purposes of allowing Debtors to seek exceptances to the modified plan of arrangement. At that meeting further continuance was granted until July 31, 1975. On that date, the Bankruptcy Court denied all requests for continuances and dismissed the proceedings. On August 29, 1975, the Order of Dismissal was signed and entered by Judge Reyland, and on September 5, 1975, Debtors filed Notice of Appeal to the Federal District Court.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court. A plethora of authority exists delineating the scope of a Bankruptcy Judge's discretion in determining how much time a debtor, pursuing his rights to achieve a plan of arrangement among creditors under the Bankruptcy Act, should have before a dismissal is ordered.

The statutory directives, found in 11 U.S.C. § 881, p. 2, supra, do not illuminate the manner in which a Bankruptcy Judge should exercise his discretion regarding continuances. Section 881 merely allows a Bankruptcy Judge to dimiss a Chapter XII proceeding "If no arrangement is accepted at the meeting of the creditors or within such time as the Court may fix." Neither this section nor any other provision of the Bankruptcy Act prescribes the number of continuances that may be granted by the Bankruptcy Judge in order to allow the debtor to obtain the necessary acceptances to the pending plan of arrangement.

Dismissals entered pursuant to 11 U.S.C. § 881 are left to the discretion of the Bankruptcy Court. *Taylor* v. *Wood,* 485 F.2d 15, 16 (9th Cir. 1972). Unfortunately, the Court in the *Taylor* case did not outline the factors by which a Bankruptcy Judge should be guided in his decision.

The Court in the case of *Rader* v. *Boyd,* 267, F.2d, 911, 914 (1959) stated the Court's responsibility as follows:

> "There is nothing in Chapter XII which prevents the proposal of an altered or modified arrangement prior to dismissal or adjudication in bankruptcy. While an adjudication may not be unreasonably deferred by the submission of successive plans, the Court in the wise exercise of its discretion should afford *fair opportunity* for the submission of an arrangement which satisfies Chapter XII. It is for the *trial* court to determine whether the statutory requirements are met or whether the matter must be concluded by dismissal or adjudication."

This Court is respectfully urged to adopt the standards set forth by Collier in his treatise in Bankruptcy in 9 Collier 14th 250, as follows:

> "Chapter XI does not specify when the First Meeting shall be concluded, and that therefore lies in the discretion of the Court. Whether to conclude the meeting on the date on which it is originally held, or to adjourn it from time to time, must necessarily depend on the facts existing in the particular case at the original meeting and at each adjourned meeting. The number and amount of acceptances already obtained by the debtor, the prospects of obtaining sufficient acceptances as indicated by the expressed attitude of the creditors at the meeting, the prospects of obtaining acceptances as a result of contemplated modifications of the plan, and any other relevant matter should guide the exercise of the Court's discretion as to when to conclude the meeting."

It is submitted that the above statement applies with equal force and effect to Chapter XII proceedings and debtors contend that they should have been granted a further continuance.

Such standards, if promulgated by this Court, would provide Bankruptcy Judges guidelines within which to uniformly and methodically exercise their powerful discretion. Debtors, seeking to salvage their interest in real

property by achieving a settlement with secured creditors, would receive the intended benefits of Chapter XII. That purpose is to provide relief for the debtor so he can pay his creditors over a period of time which retaining his property. *In re Dick,* 296 F.2d, 912, 914 (1961).

If this Court holds that Bankruptcy Judges must consider the factors set forth above, then this case should be ultimately remanded to the Bankruptcy Judge with direction for further proceedings.

The record in the instant proceedings reveals an extremely complicated array of credits and claims, and a complex title situation involving a large ranch.

Altogether, some thirty-four creditors filed claims in the instant proceedings. Of that amount approximately $1,500,000.00 was the aggregate total of creditors claiming security for their debts, while approximately $600,000.00 comprised the total of unsecured creditors claims. At various points in the proceedings debtors testified concerning the status of the title which revealed a total of eighty-eight liens on the title to debtors' real property located in Solano County, California. The real property at that location consisted of a 4,500 acre contiguous parcel of real property approximately 3,000 acres of which was and is undeveloped grazing land. Approximately 1,500 acres have been developed and are under irrigation and row crops.

At the last meeting held on July 31, 1975, the debtors had from secured creditors a total in excess of $455,000.00 of consent forms. In addition, debtors revealed to the Court that one of the creditors representing four or five percent of the total of secured creditors vote had indicated it would accept the plan but would not be able

to have a written acceptance on file in time for the hearing.

The Court pointed out at the July 31, 1975 meeting that there were certain defects present in the Modified Plan of Arrangement. Some of the defects would have been cured had the Court allowed an amendment to the Second Modified Plan of Arrangement. This amendment was widely circulated among the creditors, although leave for doing so had not yet been obtained from the Court.

It has been held that a dismissal of a Chapter XII case is not required when the creditor objecting does so on technical grounds and not upon grounds that he would not be adequately secured. *Owners of 11SW8 Real Estate* v. *McQuaid,* 513 F.2d, 558 (1975).

Under all the circumstances of this case the Bankruptcy Court should have granted debtors a continuation to further modify their plan of arrangement and to seek further acceptances thereto.

The case of *Petition of Kunz* (1939) 28 F.Supp. 730, deals with a Chapter XII proceeding in which the counsel for certain debtors attempted to pursuade the Court that the arrangement offered was unfeasible. The Court pointed out at Page 731 of its Opinion:

> "Counsel then goes on to illustrate by citation of authorities the improbability of debtors ever being able to rehabilitate themselves by means of the arrangement offered, and there is unquestionably force and reason in his argument but it is sufficient to overcome the circumstances presented here with a properly modified arrangement."

It should also be pointed out that approximately thirteen months had elapsed from the filing of debtors'

petition until the oral dismissal of the case by the Honorable Frederick W. Reyland, Jr. in this case. It is submitted that many, if not most, Chapter XII proceedings take substantially longer than one year for a valid termination on their merits. For example, the case of *Castaner* v. *Mora,* 234 F.2d, 710, involving a petition filed on November 1, 1949, and a final dismissal was not entered until September 4, 1953. The case of *Sumida* v. *Yumen,* 444 F.2d, 1281 (1971) involved a dismissal filed approximately thirty-two months after the debtor filed his original petition.

Under all the circumstances of this case, including the complexity of the title of the real property, the size of the parcel involved, the number of creditors and the nature of their claims, it is urged that the debtors should have received more time and a further continuance.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

TIMOTHY WAYNE SALTER
CARDOZO, NICKERSON, MARTELLI,
SALTER, CURTIS & ARATA
Attorneys at Law
812 - 13th Street
Post Office Box 3030
Modesto, California 95353

Telephone: 209/521-1800

Attorneys for Plaintiffs-Appellants,
BEN and LINDA ALLUSTIARTE

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. BKS 74-1887
BKS 74-1888

In the Matter of

BEN ALLUSTIARTE, *Debtor*

In the Matter of

LINDA ALLUSTIARTE, *Debtor.*

Order Dismissing Proceedings
(Jurisdiction Retained)

(Filed Aug. 29, 1975)

The adjourned first meeting of creditors and adjourned hearing on confirmation re Plan of Arrangement, and adjourned hearing to determine whether debtors should be adjudicated bankrupts or proceeding dismissed upon any of the grounds set forth in Section 481 of Chapter XII of the Act of Congress relating to Bankruptcy, was duly and regularly held in the Bankruptcy Courtroom, Stanislaus County Courthouse, Modesto, California, at 2:00 P.M., on Thursday, July 31, 1975.

The debtors were present together with their counsel, Timothy W. Salter, Esquire, and Anthony Cardozo, Esquire. The following counsel were present, representing various creditors: Hubert R. Sommers, Esquire, Kenneth Bates, Esquire, Craig Stuppi, Esquire, Frank Lane, Esquire, Milo Anderson, Esquire, John Bucan, Esquire, Michael Ahrens, Esquire, Edwin Warren, Esquire, James Morris, Esquire, Walter Schmidt, Esquire and Marjorie Mize Legaye, Esquire.

THE COURT FINDS:

A. Notice of all of the proceedings coming on for hearing this date, was duly and regularly given as required by law.

B. No arrangement was accepted by creditors of the Classes set forth in the proposed Arrangement holding two-thirds (2/3) in the amount of the debts of such Classes within the time which has been fixed by the Court for such acceptance.

C. The proposed Arrangement could not be confirmed in any event because it fails to specify certain creditors who are not dealt with by the proposed Arrangement.

D. The debtors are farmers who may not be adjudicated bankrupts except upon their consents being filed with this Court. No such consents have been filed.

E. The stay provisions of Section 428 of the Bankruptcy Act, should be dissolved.

F. Jurisdiction should be reserved to the United States District Judge for the purpose of determining what, if any, fees are allowable and to determine what, if any, costs are reimburseable.

G. In the opinion of the Court, it is in the interest of the creditors that the Petitions, heretofore filed by the debtors in this matter, proposing an Arrangement with their creditors under the provisions of Chapter XII of the Act of Congress relating to Bankruptcy, and the proceedings pertaining to said Petitions, be dismissed subject to the reservation of jurisdiction referred to hereinabove.

NOW, THEREFORE, IT IS ORDERED:

1. The debtors are farmers who may not be adjudicated bankrupts except upon their consents being filed with this Court.

2. The stay provisions of Section 428 of the Bankruptcy Act, are hereby dissolved.

3. The Petitions, heretofore filed by the debtors in this matter, proposing an arrangement with their creditors under the provisions of Chapter XII of the Act of Congress relating to Bankruptcy, and the proceedings pertaining to said Petitions, are hereby dismissed, subject to the reservation of jurisdiction to the United States District Judge for the purpose of determining what, if any, fees are allowable, and, further, for the purpose of determining what, if any, costs are reimburseable.

DATED: August 29, 1975.

/s/ FREDERICK W. REYLAND, JR.
Frederick W. Reyland, Jr.

Bankruptcy Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. BKS 74-1887
BKS 74-1888

In the Matter of

BEN ALLUSTIARTE, *Debtor.*

In the Matter of

LINDA ALLUSTIARTE, *Debtor.*

Memorandum and Order

(Filed, Jan. 28, 1976)

This is an appeal from a judgment of dismissal entered on August 29, 1975 by Frederick Reyland, Bankruptcy Judge for Modesto, California. Petitioners filed a petition for arrangement pursuant to Chapter 12 of the Bankruptcy Act, 11 U.S.C. § 801 et seq. Teh petition was filed on June 24, 1974 pursuant to § 822, and the first meeting of creditors was held on August 1, 1974.

Chapter 12 of the Bankruptcy Act permits real property owners to seek relief from their debts by filing a proposed arrangement of their financial situation, thereby protecting their property from foreclosure and also preventing involuntary (straight) bankruptcy. 11 U.S.C. § 861 sets forth the items that must be included in a proposed plan submitted by the debtors, and one of said items is a list of all creditors that will not be affected by the proposed plan. 11 U.S.C. § 868 provides that the plan, as submitted by the debtors, must be approved by ⅔ of the creditors. 11 U.S.C. § 866 allows the creditors to submit a proposed plan of arrangement. Finally, 11 U.S.C. § 884 provides that the

bankruptcy court cannot permit an adjudication of bankruptcy as against a farmer without his consent. The petitioners are farmers in this case. Thus, if a creditor were to propose a plan that would have the effect of an adjudication of bankruptcy, then that plan cannot be allowed without the consent of the debtor.

As was indicated above, the petition for relief was filed on June 24, 1974. At the first meeting of creditors on August 1, 1974, debtors ask for, and received, a continuance to October 3, 1974. On October 3, 1974, the matter was continued to December 5, 1974. At the December 5, 1974 hearing, the debtors indicated that they were negotiating for the rental of their property which would generate rents of more than $500,000.00 over a five year period. Based on that information, the judge continued the meeting until January 23, 1975. That meeting was again continued, at the request of the debtors, to February 13, 1975. At the February 13 meeting the debtors indicated that the lease proposal would probably not work out. For the purpose of developing a new and different plan of arrangement the debtors requested, and received, a continuance to April 17, 1975. At that meeting the debtors submitted a proposed plan but there was not then any confirmation of that plan by the creditors. Therefore, the meeting was continued until May 29, 1975. At the May 29 hearing, two creditors filed written objecions to the debtors' proposed plan and because of that rejection the meeting was continued, at the request of the debtors, until July 31, 1975.

At that May 29 meeting the court indicated that the continuance to July 31, 1975, was the last continuance and that if an acceptance could not be had at that time he would dismiss the matter. On July 16, 1975, the debtors requested, and received, leave to file a second modified plan of arrangement. At the July 31 meeting, the debtors indicated they did not yet have the required consent of 2/3 of the creditors. At this meeting the debtors requested another

continuance and the request was denied. Also at that hearing one of the creditors submitted an outline of a proposed plan that basically provided for the sale of the debtors' farm. At that time, the creditors submitting the plan indicated that the required consent could be obtained even though it had not yet been obtained. The bankruptcy judge denied all requests for continuances and dismissed the proceedings. The order was signed and entered on August 29, 1975, and the appeal was filed on September 5, 1975.

The findings of the bankruptcy judge and the transcript of the July 31 hearing indicate the grounds for the dismissal of the action. As to the proposed plan of the debtors, the court was aware of the fact that this action had been pending for thirteen months and that the debtors had obtained numerous continuances. Also, as of July 31, 1975, even after thirteen months, the debtors had not been able to propose a plan that was acceptable to the required number of creditors. Additionally, the court noted that the second modified plan could not be confirmed in any event because the plan failed to comply with the requirements of 11 U.S.C. § 861; in particular, the requirement that the plan list those creditors who would not be affected by the plan. As to the proposal submitted by the creditor, the court noted that the plan as submitted had the net effect of adjudication of bankruptcy which could not be allowed without the consent of the debtors. The debtors indicated at the hearing that they would not consent to such an adjudicaion. For those reasons, the bankruptcy court dismissed the action.

The question on review is whether the bankruptcy judge erred in refusing to allow any more continuances at the July 31 hearing. That question must be examined in light of the following legal principles. 11 U.S.C. § 881 provides that if no arrangement is accepted at the meeting of creditors or within such further time as the court may fix, the court shall either dismiss the petition or adjudicate the

debtor a bankrupt, whichever in the opinion of the court is in the best interests of the creditors. Action of the judge under this section is discretionary and will not be reversed unless there is an abuse of discretion. *Taylor* v. *Wood*, 458 F.2d 15 (9th Cir. 1972). Rule 12-41 of the Bankruptcy Rules provides that a dismissal is proper if there is a lack of prosecution or if no plan is confirmed. 11 U.S.C. § 861 sets forth the items which must be included in a proposed plan. 11 U.S.C. § 872 states that an arrangement will be confirmed if the court is satisfied that the provisions of Chapter 12 have been complied with.

The facts of the instant case reveal that the second modified plan that was before the bankruptcy court on July 31, 1975, was not capable of being confirmed because it failed to specify those creditors who were not being affected by the plan. Also, the record reveals that debtors did not have the requisite majority of acceptances to the invalid plan that was before the court. The court had been granting continuances for thirteen months and during that time the creditors that had secured interests were denied the right to act on those interests. It does not appear that it was unreasonable for the bankruptcy court to feel that the debtors had exhausted all practical hopes of achieving a workable plan. After having seven continuances and not even being close to adoption of a valid plan, it was not an abuse of discretion on the part of the bankruptcy judge to deny the request for further continuances. The transcripts of the proceedings below shown a marked tendency to produce no results. The meetings accomplished very little. There was no abuse of discretion here.

With regard to the last minute proposal by one of the creditors, the proposal was for the debtors to sell their farm and distribute the assets to the creditors. Such a plan is nothing more than a straight bankruptcy plan. Chapter 12 was meant to avoid such a result. Since the debtors were farmers, their consent was needed for an adjudication

of bankruptcy. At the July 31 hearing the attorney for the debtors indicated that they would not consent. Thus, the proposal by the creditor was incapable of ever being confirmed. To allow circulation of the creditor's plan for signature would have been a waste of everyone's time. Again, the Court cannot find an abuse of discretion.

IT IS THEREFORE ORDERED that the motion for reversal and/or remand be, and the same is, hereby denied.

DATEDS January 28, 1976.

/s/ PHILIP C. WILKINS
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1864

In the Matter of

Ben Allustiarte and Linda Allustiarte, Bankrupts
BEN and LINDA ALLUSTIARTE, *Plaintiffs-Appellants,*

v.

HENRY ELWOOD PETERS and KERN VALLEY PACKING CO.; and RUDNICK LAND and CATTLE CO., *Defendants-Appellees.*

Memorandum

(Filed Jan. 11, 1979)

Appeal from the United States District Court for the Eastern District of California

Before: TRASK and SNEED, *Circuit Judges,* and SKOPIL,* *District Judge*

This is an appeal from the district court's approval of a bankruptcy court's dismissal of a Chapter XII petition.

Appellants filed the Chapter XII petition on June 24, 1974. The initial creditors meeting was held on August 1, 1974. Continuances were granted several times over the course of the next several months. Appellants told the court that leases were being negotiated for the property in question, a 4,500 acre ranch. During this period, several plans of arrangement were proposed, but creditors rejected them.

---

* Honorable Otto R. Skopil, Jr., United States District Judge, District of Oregon, sitting by designation.

On July 16, 1975, the debtors were given permission to file another modified plan of arrangement. At the July 31, 1975, session, the debtors admitted that they did not have the required consent of two-thirds of the secured creditors. To secure the necessary approvals, the debtors requested a further continuance, but the judge denied this by dismissing the Chapter XII petition.

Appellants appealed this dismissal to the district court, but the district court affirmed the bankruptcy court's decision.

A bankruptcy judge may dismiss a Chapter XII proceeding "if no arrangement is accepted at the meeting of the creditors or within such further time as the Court may fix . . . ." 11 U.S.C. § 881. Such dismissals are left to the discretion of the bankruptcy court. *Taylor* v. *Wood,* 458 F.2d 15, 16 (9th Cir. 1972).

Appellants have pointed to no factors evidencing abuse of discretion by the bankruptcy court in dismissing their petition. After 13 months, appellants had not even come close to obtaining the two-thirds approval for a plan of arrangement as required by 11 U.S.C. § 868(1). This was not a complex case. There were less than 70 creditors and only one piece of real property involved. This dismissal was well within the bankruptcy court's discretion.

Appellants also attempt to appeal from the bankruptcy court's refusal to grant a continuance to a creditor who desired to present a plan of arrangement. Appellants do not have standing to appeal from a determination adverse to another party.

Judgment Affirmed.